

IN THE MATTER OF THE HUMAN RIGHTS CODE, 1981
S.O. 1981, c. 53, As Amended

In the matter of an amended Complaint made by Ron Smith, and the Complaints made by Dan Cann, Kris Wickens, Theresa Quinn, Ian Jarvis, Anke Eggers, Wayne Acheson and Krystal Keller, the Complainants and 599449 Ontario Ltd. (Carrying on business as Blue Mountain Go-Karts) and J. H. Reid and Wasaga 500 Go-Karts Ltd. and Robert Croll Respondents.

Place of Hearing: Collingwood, Ontario

Date of Hearing: September 6, 1991

Board of Inquiry - M. R. Gorsky

Appearances

For the Commission - Kaye Joachim
Counsel
Marilyn Ginsburg
Counsel

For the Respondents:

599449 Ontario Ltd. carrying on business as Blue Mountain
Go-Karts and J. H. Reid

- David S. White
Counsel

Wasaga 500 Go-Karts Ltd. and Robert Croll

- Victor Vandergust, Counsel

For the Complainants - In person

I N T E R I M D E C I S I O N

On August 12, 1991, I was appointed by Elaine Ziemba, Minister of Citizenship with Responsibility for Human Rights, Disability Issues, Seniors' Issues and Race Relations, as a Board of Inquiry to hear and decide the complaints made by Ron Smith, Dan Cann, Kris Wickens, Theresa Quinn, Ian Jarvis, Anke Eggers, Wayne Acheson and Krystal Keller, dated March 21, 1990, alleging discrimination in services on the basis of handicap by 599449 Ontario Ltd., carrying on business as Blue Mountain Go-Karts (hereinafter referred to as "Blue Mountain") and J. H. Reid; and the complaints of the same persons dated March 21, 1990, alleging discrimination in services on the basis of handicap by Wasaga 500 Go-Karts Ltd. (hereinafter referred to as "Wasaga") and Robert Croll.

The respondent J. H. Reid manages Blue Mountain and the respondent Robert Croll manages Wasaga.

The eight complaints against Blue Mountain and Reid and the eight complaints against Wasaga and Croll have certain facts in common.

(1) The complainants Ron Smith, Dan Cann, Kris Wickens, Ian Jarvis, Wayne Acheson and Anke Eggers are all persons with a developmental handicap. The complainants Krystal Keller and Theresa Quinn are staff members of the Meaford & District Association for the Mentally Retarded.

(2) In the complaints it is alleged that the respondents were denied the right to use the go-kart facilities of Blue Mountain and Wasaga. In the case of the complainants Ron Smith, Dan Cann, Kris Wickens, Ian Jarvis, Wayne Acheson and Anke Eggers, the reason for denying them the right to use the go-kart facilities was based on their developmental handicaps, contrary to the provisions of the Human Rights Code 1981 S.O. 1981, c. 53, ss. 1 and 8 (hereinafter referred to as the "Code"). The complainants of Theresa Quinn and Krystal Keller are with respect to the denial by the respondents of their right to use the go-kart facilities because of their relationship with the other complainants, being persons who are developmentally handicapped.

(3) In all cases, the complainants claim that they were denied equal treatment with respect to services and facilities without discrimination; in the case of the complainants Ron Smith, Dan Cann, Kris Wickens, Ian Jarvis, Wayne Acheson, and Anke Eggers, because of handicap, in contravention of ss. 1 and 8 of the Code; and in the case of Theresa Quinn and Krystal Keller, their complaints allege that their right to equal treatment with respect to the provision of goods, services and facilities, without discrimination was violated, contrary to the provisions of ss. 1, 8 and 11 of the Code, because of their association with handicapped persons.

(4) The provisions of the Code which were said to have been

violated are as follows:

1. Every person has a right to equal treatment with respect to services and facilities, without discrimination because of ... handicap.
8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
11. A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

The incidents which gave rise to the complaints all occurred on or about July 19, 1988 when the complainants, as a group, went to Blue Mountain and to Wasaga with a view to riding the go-karts of those respondents. It is alleged that they were prevented from doing so at Blue Mountain by Reid and at Wasaga by Croll.

(5) The evidence against all of the respondents concerning the nature of the developmental handicap associated with those complainants who are so handicapped will be the same.

(6) The evidence with respect to the relationship between Theresa Quinn and Krystal Keller and the other complainants will be the same.

(7) The evidence with respect to the capacity or ability of the complainants to safely use the facilities of the respondents Blue Mountain and Wasaga (that is to drive go-karts) will have significant common features.

(8) From the statements made by counsel for the respondents, it appears that a number of common questions of fact and law exist in the case of the complaints against Blue Mountain and Wasaga. Some of the possible defenses referred to were based on the right of the respondents to make "judgement" calls when deciding whether to permit potential customers to drive go-karts. Common questions of law include the manner in which the operator of a facility must consider the case of a potential customer who is subsequently denied the right to use the facility. Matters which were also raised by counsel for the respondents included their obligations to ensure the safe operation of each of their facilities imposed by statutes and insurance contracts; the obligation to "protect" the complainants from harm; the obligation to employees of the respondents Blue Mountain and Wasaga to protect them from harm; the right to safeguard the integrity of each facility and its equipment.

The facts relating to the complaints against Blue Mountain and Reid and Wasaga and Croll may differ in a number of respects, but, as above noted, there will be some significant questions of fact and law which will be the same in the case of all of the complaints even though some of the facts to be applied to that law may be different.

Sometime prior to my appointment, the Commission combined all of the complaints pursuant to s.31(3)(b):

Where two or more complaints, ...

- (b) have questions of law or fact in common, the Commission may combine the complaints and deal with them in the same proceeding.

At the commencement of the hearing, counsel for the Commission requested the following amendments to four of the complaints against Wasaga, being those of Kris Wickens, Ian Jarvis, Wayne Acheson and Anke Eggers. Paragraph nine in those complaints states: "I am able to operate a go-kart, and have done so in the past. I live independently and am a responsible person. Mr. Croll did not ask about my abilities." In each of these complaints the amendment requested was a removal of the words: "I am able to operate a go-kart and have done so in the past." Counsel for the respondents Wasaga and Croll objected to the amendments being allowed. The Board cannot see that there is any prejudice to the respondents should the amendments be allowed; if anything, they may assist them, and the amendments are therefore allowed.

At the opening of the hearing, a number of motions were made. Mr. White, counsel for Blue Mountain and Reid, supported by Mr. Vandergust, counsel for Wasaga and Croll, moved that the complaints be dismissed because of the prejudice that would be suffered by the respondents as a result of the elapse of some thirty-eight months since the alleged occurrence that led to the filing of the complaints. The matters referred to by counsel included the

inability to secure the attendance of witnesses vital to the defense whose whereabouts are unknown, and that there is now no practical way of communicating with them in order to obtain evidence vital to the defense of the respondents, and to secure their attendance at the hearing in order that they might give evidence. It was also submitted that as a result of delay records which were necessary in order to prepare the defenses may no longer be available, and that the recollections of Messrs. Reid and Croll, with respect to events vital to the defence of the complaints, might now be insufficient to enable them to prepare defences for themselves and for the other respondents whom they represent.

Ms. Joachim, counsel for the Commission made reference to the jurisprudence when a motion is made to a board of inquiry to dismiss complaints because of prejudice that would flow from permitting the case to proceed after the passage of an extensive period of time from the occurrences that led to the filing of the complaints. She also argued that the respondents were in a position to secure necessary documents and evidence at the time that the complaints were filed, and that if they neglected to do so any self-induced inability to prepare a defense could not amount to the kind of prejudice that might be considered by a board of inquiry on such a motion.

In moving that the complaints be dismissed because of the alleged prejudice induced by the delay in appointing a board of

inquiry, counsel for the respondents relied on authority where criminal prosecutions were dismissed because of undue delay in bringing a matter to trial. In keeping with his view of these proceedings as being quasi-criminal in nature, counsel for Wasaga requested that if the complaints were not dismissed, they should be stayed.

In Commodore Business Machines Ltd. et al. and Minister of Labour for Ontario et al. (1985) 5 C.H.R.R. D/2833, being an appeal to the Supreme Court of Ontario against a decision of a board of inquiry, the Court, at p.23161, noted that a decision of a board of inquiry appointed pursuant to s. 19 of the Ontario Human Rights Code, R.S.O. 1980, c.340 (now section 40 of the Code), where it finds a contravention of the Code and awards compensation, does not relate "to being charged with an offence." Although the decision was overruled on appeal to the Court of Appeal, the finding that the board's jurisdiction under what is now section 40 of the Code does not relate to a person being charged with an offence, was not affected.

In Linda Guthro and Westinghouse Canada Inc., an unreported decision of a board of inquiry appointed under the Code, dated August 9, 1991, there was a review of the jurisprudence under the Code where there was an allegation of unreasonable delay and a request that the complaint be dismissed because of the prejudice suffered by a respondent as a result of the delay. At pp.4-5, of

the Guthro case, there is the following statement:

Prof. J. D. McCamus in Hyman v. Southam Murray Printing and International Brotherhood of Teamsters, Local 419 (1981), 3 C.H.R.R. D/617 at D/621 said:

... while unreasonable delay might be a factor to be taken into account in refusing or fashioning a remedy ... or in weighing the persuasive force or credibility of testimony or other evidence, delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred.

The proper course, the board added:

... is for the board of inquiry to proceed and to weigh the prejudice or unfairness to a particular party which may have been occasioned by delay in making particular findings of fact or in refusing or fashioning a remedy.

In the case at hand, the time interval from the first alleged infraction of the Code to the present is about 19 years. If delay alone were to be considered as the sole criterion, there would be no need to proceed with the case. However, the concept of unreasonable delay will not, by itself, be a bar to hearing the facts of the matter. The matter may be analogized to the equitable doctrine of laches where the key question is whether the delay caused prejudice to a particular party. Only by submitting evidence of such prejudice will the party be afforded an opportunity to succeed; the passage of time does not create an automatic dismissal of a complaint.

There is a technical consideration, as well. When the Minister appoints a board of inquiry under section 37 of the Code, she or he has the complaint on his or her desk, and knows that the allegations of contraventions of the Code antedate the complaint; in this case by some 10

years. The Code instructs the board of inquiry to hold a hearing to determine whether a right or the complainant has been infringed, to determine who infringed the right, and to decide upon an appropriate order (section 38). These two sections of the Code are given little weight when matters of delay are treated as automatic signals to terminate the hearing.

It is an uncommon event in the case law when the proceedings are halted because of prejudice to a party. In Commercial Union Assurance and the Ontario Human Rights Commission (1987), 9 C.H.R.R. D/5140, the Divisional Court held, inter alia, that the death of a key witness created serious prejudice to the respondent. The decision was affirmed by the Court of Appeal, Ontario Human Rights Commission and Commercial Union Assurance (1988), 9 C.H.R.R. D/5144.

Other cases which followed the Hyman case, are set out at pp.5-6 of the Guthro case.

At the hearing, the Board informed counsel that the Board would be following the Hyman case, and would, in proceeding with the hearing, bear in mind the question of prejudice to the respondents. If the evidence discloses such prejudice, the unreasonable delay will be a factor "to be taken into account in refusing or fashioning a remedy ... or in weighing the persuasive force or credibility of testimony or other evidence"

Counsel for Blue Mountain and Reid also moved that the complaints be dismissed on the grounds that the breach alleged was "trivial," indicating that he regarded the denial to the complainants of the right to use the go-kart facilities as being a matter of little moment and insufficient to warrant the continuation of the proceedings. Counsel observed that the hearing

of the complaints was likely to take several days, and in addition to imposing a considerable financial burden on the respondents, it was going to take up several days of their time and had the potential for visiting upon them a disproportionate penalty, given the nature of the alleged denial of service.

I pointed out to counsel that I could only decide whether the complaint was trivial; and then decide to dismiss it, after hearing the evidence. Section 40(6) of the Code provides:

Whereupon dismissing a complaint, the board of inquiry finds that,

- (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
 - (b) in the particular circumstances undue hardship was caused to the person complained against,
- the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

Accordingly, the Board has no jurisdiction to dismiss the complaints at this stage on the basis of an allegation that they are "trivial." The Board notes that Commission, prior to recommending the appointment of a board of inquiry, pursuant to section 33 (1) (b) of the Code, can prevent the waste of time involved in investigating a dubious complaint by deciding not to deal with the complaint where, "the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith"

The Board also notes that it is difficult to see how the complaints can be viewed as being "trivial" if the facts alleged in them are established, and it is found that the complainants Ron

Smith, Dan Cann, Kris Wickens, Ian Jarvis, Wayne Acheson and Anke Eggers were denied their "right to equal treatment with respect to services ... and facilities, without discrimination because of ... handicap," as is provided for in section 1 of the Code, and that the complainants Theresa Quinn and Krystal Keller were denied their "right to equal treatment with respect to services ... and facilities, without discrimination because of" their "relationship, association or dealings with [the other complainants] identified by a prohibited ground of discrimination," as is provided for in section 11 of the Code.

The rights of the complainants under sections 1, 8 and 11 of the Code, represent important statutory protections and in the absence of evidence to demonstrate that the complaints were brought for some vexatious purpose or were brought in bad faith and not with a view to obtaining vindication under the Code, it is highly unlikely that they would be dismissed on the grounds that refusal to permit the complainants to use the go-kart track facilities was a trivial matter. The complainants have a right not only to have their complaints heard, but, if established, to such vindication as is available to them under the Code.

In the larger scheme of things any person's driving a go-kart on a particular day would be a matter of little moment. However, it is important to distinguish such inability from every person's "right to equal treatment with respect to services and

facilities, without discrimination because of ... handicap," and the right not to be discriminated against " ... because of relationship, association, or dealings with a person or persons identified by prohibited grounds of discrimination." To confuse the nature of the service or facility with the right of a person to receive equal treatment when seeking to use the service or facility free from prohibited forms of discrimination, appears to the Board to entirely miss the significance of the protections afforded by the Code. The protected rights are of fundamental importance not only to the persons directly protected by the Code but to all persons. In recognizing the reasons for the enactment of the Code, the Preamble refers to "the inherent dignity and the equal and inalienable rights of all members of the human family ... [as being] the foundation of freedom, justice and peace in the world ... ," and that "... it is the public policy in Ontario to recognize the dignity and worth of every person in Ontario and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well being of the community and the Province." In the light of this purpose, a denial of service such as is alleged in the complaints cannot be viewed as being "trivial."

Wasaga and Croll), throughout his various submissions, stressed the difficulties that were being imposed on the respondents as a result of the proceedings following upon the filing of the complaints, and the interference with their freedom to run their businesses and their right right to make business decisions which might deny some persons the right to use the go-kart services and facilities. That is: to decide where, in their best judgement, it would be unsafe to permit the complainants to operate the go-karts. The imposition of the obligations imposed by the Code will inevitably interfere with the "freedom" to operate businesses, and the pursuit of remedies under the Code may cause inconvenience, expense, and sometimes embarrassment to respondents. This does not mean that a board of inquiry will not intervene where it is demonstrated that there has been prejudice caused to respondents as a result of undue delay in appointing a board.

In addition, the Board indicated that it would intervene, where necessary, to ensure that the hearings were not unnecessarily protracted in order to limit the expense incurred and inconvenience experienced by the respondents in defending their positions. The Board observed that there was an indication from the parties that a considerable amount of the evidence that would be material to the hearing may not be in dispute. I strongly urged the parties to exchange information relating to their factual positions and the evidence intended to be adduced in support of them. I indicated that if this were done it would likely be possible for the parties

to agree to those facts which are not in issue. In that case, the Board could be advised of what facts have been agreed to and, to the extent that evidence would have to be called, the agreement could be noted or the evidence led, thus shortening the time that might otherwise be taken in adducing the evidence.

In order to assist counsel for the respondents to prepare for the hearing on the merits, counsel for the Commission undertook to furnish them with a summary of the evidence they intended to adduce and, if the Commission intends to rely on the evidence of experts, to comply with the provisions of Rule 53.03 (1), and/or section 52 of the Evidence Act.

The Board also indicated that, in its view, in most circumstances, facts agreed to are not likely to be improved upon by having them adduced through the oral testimony of witnesses. Although some facts may be best adduced through the giving of viva voce evidence, many agreed to facts, such as physical facts involving the number of pieces of equipment, their description, and numbers of employees, their identification and location, are not likely to be improved upon by having them established through the giving of viva voce evidence.

Counsel for the respondents insisted that the Board schedule the hearing over a period of consecutive days, the indication being that the hearing would take at least six days. The Board informed

counsel that this would not be possible, but that a number of days for hearing were available which were consecutive and which were fairly proximate to the date of first hearing. Unfortunately, one or the other of counsel for the respondents were not available on those dates. The Board will do everything possible to accommodate counsel and the parties in scheduling dates for the continuation of the hearing.

Given the mandate of the Board to hear the matter as expeditiously as possible and to render its decision shortly thereafter, it is not possible to grant the additional request of counsel for Wasaga and Croll to postpone the hearing until May of 1992 in order to accommodate Mr. Croll, who, it was said, would be engaged in an undertaking in the United States during the winter months.

Counsel for the respondents also objected to the combining of the complaints by the Commission pursuant to section 31(3)(b) of the Code, although counsel for Blue Mountain subsequently withdrew his objection, reserving, however, the right to raise objections to any order that the Board might make relating to his right to cross-examine witnesses in the combined complaints, including cross-examination of any witnesses called on behalf of Wasaga and Croll.

The Board indicated to counsel at the hearing that the decision to combine the complaints was that of the Commission, and

that the right to make such decision is provided for in section 31(3)(b). The Commission having combined the complaints and dealt with them in the same proceeding, and the Minister having appointed me as a Board of Inquiry, pursuant to section 37(1) of the Code to hear and decide the combined complaints and to deal with them in the same proceeding, I cannot directly separate those made against Blue Mountain and Reid from those made against Wasaga and Croll and deal with them in separate proceedings. I have noted above that the complaints against Blue Mountain and Wasaga appear to have a number of questions of law or fact in common. Counsel for the respondents did not deny that this was the case but argued that if the Board permitted the combined complaints to proceed in the same proceeding there would be an abuse of the Board's processes for a number of reasons:

1. There were said to be a number of issues of fact and law which arise in the complaints against Blue Mountain and Reid which do not arise in the complaints against Wasaga and Croll, as well as issues of fact and law which arise in the complaints against Wasaga and Croll which do not arise in the complaints against Blue Mountain and Reid. This, it was said, would impose an unfair burden on the respondents who would incur additional expense as a result of having to be attend the hearing when issues were being dealt with which had nothing to do with the complaints against them.

2. It was also argued that the respondents are in competition with each other, and that they would be prejudiced by requiring them to have the complaints against them combined and dealt with in the same proceeding, as this would put them in a position where, in defending their respective interests, they would be required to give their competitor information about the operation of their undertaking, which information would otherwise have been secret.

There was a similar preliminary objection raised in the Hyman case that the board should exercise its discretion in favour of not hearing complaints against different respondents together. In para.5640 at p.D/625, it was urged that one of the respondents would be prejudiced if the complaint against itself and that against the other respondent were heard at the same time, although it was conceded that there might be some convenience to be achieved in hearing all of the complaints together. It was submitted that, on balance, "the possible prejudice to [one of the respondents] was sufficiently grave as to outweigh considerations of mere convenience or expense."

At pp.D/626 of the Hyman case, the board stated:

5643 The Ontario Human Rights Code does not deal expressly with this point. No express power is conferred upon Boards of Inquiry to consolidate complaints or otherwise hear them together. I am of the view, however, that the ability to hear complaints together must be considered to be a power conferred upon a Board of Inquiry by necessary implication from the provisions of the Code. The very establishment of Boards of Inquiry

with certain powers under the Code suggests that they must have the power to control their own procedures subject, of course, to over-riding principles of law such as those expressed in the Ontario Statutory Powers Procedure Act, and, presumably, general principles of fairness. With respect to the question of whether or not complaints should be heard together, the element of fairness would require a balancing of any prejudice sustained or potentially sustained by any of the parties against the public interest in avoiding a multiplicity of proceedings.

5644 The most obvious and appropriate source of guidance with respect to the balancing of these conflicting interests are the rules which have been developed by the judicial system to deal with questions of this kind. In Ontario, these principles are stated in Rules 66 and 67 of the Rules of Practice of the Supreme Court of Ontario, R.R.O. 1970, reg. 545, as amended, providing for the joinder of causes of action. It is not joinder in the precise sense that is contemplated here; it is not proposed that each of the respondents become parties to the complaints brought against the other respondent. However, in hearing the two complaints together the practical effect would be essentially the same as joinder -- the evidence led at the hearing would be heard with respect to all complaints -- and, accordingly, the joinder rules appear to be the most appropriate source of guidance. ...

5645 In sum, then, it is my view that a Board of Inquiry does have the power to hear more than one complaint at the same time. I note that Professor Tarnopolsky sitting as a Board of Inquiry in the case of Morgan v. Toronto General Hospital, October 14, 1977 has expressed a similar view at pp. 13-15. In weighing the potential prejudice to the respondent employer against the evident interest in avoiding the expense and inconvenience of a multiplicity of proceedings, I come to the conclusion that the latter in the present case, substantially outweighs the former. Indeed, I am not convinced that the alleged prejudice should be considered prejudice for these purposes. Certainly, the general structure of Rule 67 strongly suggests that it should not.

The comments made by the board in the Hyman case are significant to the case before this Board notwithstanding the change in the Code that now enables the Commission, in effect, to

consolidate complaints or otherwise hear them together. The combining of the complaints by the Commission so that they would be dealt with in the same proceeding, pursuant to section 31(3)(b) of the Code, is a statutory form of consolidation. Each complaint was commenced as a separate proceeding. To build on the analogy employed in the Hyman case with respect to matters governed by the Rules of Civil Procedure (in referring to the rules with respect to joinder, then Rules 66 and 67, now, in modified form, Rules 5.01(1) and 5.02 (1) and (2)), what section 31(3)(b) of the Code has done is to provide for a means of consolidating complaints by the Commission.

What is provided for in Rule 6.01(1), which permits consolidation of actions by the court or the hearing of proceedings together or one after the other, is similar to what is provided for in section 31(3)(b) of the Code, which enables the Commission to effectively consolidate complaints, and provides for their being heard together. The policy underlying Rule 6.01(1) - the avoiding of a multiplicity of proceedings and the promotion of the expeditious determination of proceedings is similar to that underlying section 33(3)(b). Under Rule 6.02, the presiding judge has the discretion to order otherwise.

Rule 5.05 provides for relief against joinder of multiple claims or parties in the same proceeding where the result of doing so might "unduly complicate or delay the hearing or cause undue

predudice to a party." Given the similairsty in result between joinder and consolidation, Rule 5.05 would furnish the presiding judge with guidance when exercising his or her discretion under Rule 6.02, and can also furnish guidance to a board of inquiry faced with the same situation.

In Keene, Human Rights in Ontario, at p. 264, the author states:

Where the Commission has joined complaints, it is possible that a respondent may wish to apply to the board for severance of the complaints. It is unclear whether a board has jurisdiction to make such an order, except possibly under section 23(1) of the Statutory Powers Procedure Act, which provides that "A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."

Assuming that a board has the power to sever the combined complaints, it would likely do so where the combination of the complaints and the hearing of them together might "unduly complicate or delay the hearing or cause undue prejudice to a party." At this stage, there is insufficient evidence to grant the request for severance.

As noted above, there will likely be a good deal of evidence which will be common to both cases. The evidence adduced on behalf of the complainants common to both cases will only be adduced once. Counsel for both sets of respondents will be permitted to cross-examine witnesses called on behalf of the complainants, subject to the usual restrictions that would apply in civil litigation in the courts where more than one counsel has the right of cross-

examination. This would include a limitation on any attempt to cover the identical ground dealt with by the counsel who cross-examines first. Also, evidence called by counsel for the Commission which is only material to the complaints against Blue Mountain and Reid will not be subject to cross-examination by counsel for Wasaga and Croll. Evidence which is only relevant to the complaints against Wasaga and Croll will not be subject to cross-examination by counsel for Blue Mountain and Reid.

It does not appear, at this stage, that the respondents are opposite in interest, and unless special circumstances are demonstrated they will not be permitted to cross-examine each other's witnesses.

At this time, it would be premature to issue directions as to the procedure to be followed in the event that any of the respondents may suffer harm by giving evidence in defense of their positions because that evidence will contain information relating to the operation of their respective businesses which would otherwise remain secret. If this matter is to be pursued further, I would expect counsel requesting an order to furnish the Board with full written argument in advance of the continuation of the hearing.

It appeared that all counsel were desirous that the Board take a view of the undertakings of the respondents pursuant to section


38(5) of the Code, and at least one of counsel wished the chair to drive a go-kart in order that the evidence might be better understood by the chair. The Board indicated that while it would, if necessary, view the undertakings; at this time, it appeared that the purposes of the parties requesting that a view be taken would be adequately served if a video recording was made of each of the undertakings so that the Board might be in a better position to follow the evidence when it refers to the physical layout of the undertakings. Counsel indicated that they anticipated that they could arrive at an agreement as to how, when, and by whom, the video recording would be made.

I would remind counsel of the limited nature of what may take place at a view: " ... The view may not include experiments with objects at the scene by the trier of fact in order to test courtroom testimony about them, nor demonstrations to the trier by witnesses who have already testified" (See, Schiff, " The Use of Out of Court Information In Fact Determination at Trial" (1963) 11 Can Bar. Rev. 335.)

Before the hearing adjourned, counsel indicated that they would be pursuing discussions, sometime in October, with a view to resolving all or part of the issues raised by the complaints, including issues of fact. In particular, the parties intended to discuss a settlement based on the preparation of a document to be agreed upon by them setting out a process that would be fair to all

persons, which would be employed by the respondents in assessing whether a person would be permitted to drive go-karts on their respective premises. The Board indicated that it wished to furnish the parties with an opportunity to settle all or part of the issues involved in the complaints, and also indicated that if this were not possible, dates would be set for the continuation of the hearing on the request of any of the parties. Given the mandate of the Commission, the Board would prefer a mutually acceptable settlement. In recognition of the fact that this may not be possible, this interim decision is being issued to ensure that the parties are aware of the Board's decision with respect to the several motions referred to herein, and so that the continuation of the hearing can take place at the earliest possible time.

Dated at Toronto this 16th day of September, 1991.


M. R. Gorsky - Board of Inquiry

IN THE MATTER OF The Ontario *Human Rights Code*, R.S.O.
1981, c.53, as amended.

B E T W E E N:

ONTARIO HUMAN RIGHTS COMMISSION
("The Commission")

- and -

RON SMITH, DAN CANN, KRIS WICKENS, THERESA QUINN, IAN JARVIS,
ANKE EGGERS, WAYNE ACHESON and KRYSTAL KELLER
("The Complainants")

- and -

WASAGA 500 GO-KARTS and ROBERT CROLL and 599449 ONTARIO LIMITED
(Carrying on Business as Blue Mountain Go-Karts) and J.H. REID
("The Respondents")

ORDER

This Board of Inquiry was appointed on August 12, 1991, by the Minister of Citizenship pursuant to Section 37 of the *Human Rights Code* to hear and decide the amended complaints by Ron Smith, Dan Cann, Kris Wickens, Theresa Quinn, Ian Jarvis, Anke Eggers, Wayne Acheson and Krystal Keller, dated March 21, 1990, alleging discrimination because of handicap in the provision of a service, by Wasaga 500 Go-Karts and Robert Croll, and By Blue Mountain Go-Karts and J.H. Reid;

This proceeding commenced on September 6, 1991, in Collingwood, Ontario. There were a number of procedural motions at that time, which I have previously dealt with in my Interim Decision of September 16, 1991.

Subsequent to the first day of hearing I was notified that the parties had settled the remaining issues between them.

On reading the complaints and the Minutes of Settlement filed between the parties, and on consent of all parties;

This Board of Inquiry ORDERS that this proceeding be disposed of on the terms of the Settlements attached, which are approved by the Board of Inquiry and are incorporated into this Order.

June 1, 1992
Date

M.R. Gorsky
M.R. Gorsky
Board of Inquiry